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Workshop: Grievance and Arbitration Role Play - Handouts

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Outline of Arbitration Workshop

Role of the Arbitrator

Authority to Arbitrate

Challenges to arbitrability

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- Substantive Arbitrability
- Procedural Arbitrability

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- Rulings based on:
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 - Equity
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How Arbitrators Decide

This paper is only a brief review of the factors that come into play during an arbitration hearing. It will touch on some of the factors that should guide the advocate for both the employer and the employee. It will point out some of the criteria that should be employed to make the witness more effective. It is by no means exhaustive in attempting to address the many complexities that come into play during a Grievance Arbitration Hearing. Hopefully it will give the reader a glimpse at how arbitrators think and rule.

The Arbitrator

The dictionary defines **arbitration** in part as a process by which parties in dispute submit their arguments to an impartial person, the **arbitrator**, for a judgment and resolution that generally will be binding on the parties to the dispute. Most labor contracts have binding arbitration as a final step in the grievance process, while a few have an advisory award that the parties may or may not wish to follow. Even fewer collective bargaining agreements end the grievance machinery without any form of arbitration at all. Once the parties agree to submit the dispute to arbitration an arbitrator must be selected. While the procedure may vary slightly depending on the agency responsible for over-seeing the arbitration process, the parties typically select a mutually acceptable individual to function as the arbitrator. The list of names or panel of arbitrators is distributed to the parties, and by process of elimination an acceptable arbitrator is selected. Regardless of the type of arbitration in the agreement, arbitrators, no matter how impartial they may be, will be swayed by a variety of factors when reaching a decision.

Authority to arbitrate

Arbitrators have a great deal of leeway when it comes to fashioning an award. However, their authority is limited by that vested in them by the controlling documents, usually the collective bargaining agreement between the parties in

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dispute. The format currently used in the practice of arbitration was largely established by what is referred to as the Steelworkers Trilogy, a series of three cases that in 1960 changed the way that arbitration is dealt with in this country, and remains the basis courts use to determine questions of arbitrability. It aided in the establishment of the body of rules maintaining the necessity of the arbitrator's neutrality and impartiality in making deliberations. The arbitrator's role is to be determinative, not to find compromise. If compromise is part of the settlement then the parties will arrive at it independently, perhaps with the arbitrator serving as mediator. Arbitrators cannot impose their feelings of what is fair or reasonable; once the issue goes to hearing, the decision must be driven by the testimony presented during that hearing.

Challenges to arbitrability

Public sector arbitrability may be challenged on three grounds: Legal Arbitrability, Substantive Arbitrability and Procedural Arbitrability. In the public sector legal challenges are resolved within the scope of negotiations laws for the various states. It is generally the role of the commission that oversees the Collective Bargaining law to make the determination of the legality of arbitration on a case-by-case basis. However, even when the Bargaining Statute allows for an issue to be arbitrable, the Collective Bargaining agreement can limit the issues that may go to arbitration. Contractual limitations are a valid argument for challenging arbitrability. A Substantive Arbitrability challenge essentially alleges that the grievance filed is not within the scope of the definition as agreed to by the parties in the collective bargaining agreement. Procedural Arbitrability challenges allege

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that the grievance was not timely filed or processed. The arbitrator has the authority to rule on issues of procedure. Often the threshold question of arbitrability results in a bifurcated hearing where the parties need to argue the procedural question prior to addressing the substantive issue.

Private sector challenges to substantive arbitration are generally resolved in the courts using a variety of precedent-setting cases, namely the Steel Worker Trilogy previously mentioned. The Federal Courts and United States Supreme Court decisions have created a strong presumption in favor of arbitration. It would need to be an extremely persuasive argument for the courts to even hear the issue. Generally the courts support the arbitrator's decision in making the determination of arbitrability.

Issues that impact the Arbitrator

The Advocate

Framing the Issue

The arbitrator needs to understand the whole question of what is in dispute to answer it correctly. The question should be presented as briefly as possible. If there are multiple issues to be decided, the format should state only one question at a time. Compound sentences create complexity and may become confusing to all involved.

Be prepared.

Don't attempt to wing the hearing. Insufficient preparation often results in a minimum of facts and a maximum of argument—and argument is not evidence.

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Be ready to stipulate.

The more documents that may be stipulated and submitted as joint exhibits, the less need for testimony. The result saves time and also proves less costly in the end. The greater the amount of information that is stipulated the shorter the hearing that ensues.

Harassment

Arbitration and arbitration costs should not be a harassing technique. One should not go into an arbitration using it as a weapon to beat the opponent over the head. Arbitration filings that are frivolous, and/or filed in order to punish the opponent are often losers.

Obfuscation

Don't conceal the essentials of the case; they will come out eventually and place the advocate in a poor light! There is a need to be forthright and honest. In the long run you will fare better than if you hold out or concoct questionable testimony. Once revealed as less than honest it is difficult to recoup even if it was only a single inconsequential issue.

Legal Technicalities

Don't play Perry Mason. The arbitration hearing is less formal than a court procedure and is designed to be so. Muddying the procedure with legal technicalities does not impress and may in fact confuse the issue. Objecting when it is not necessary or relevant can slow down the procedure and antagonize the opposition as well as put doubts in the mind of the arbitrator. Legitimate objections should be raised but only as needed and when relevant.

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Maintain rules of courtesy and decorum

Civility should reign. The arbitration hearing is not a time to exhibit animosity. It is a procedure that should be streamlined and exhibit the greatest effort toward getting the issue on the table and presenting relevant data and testimony. Maintain your cool, don't lose your temper. You do not have to like the opposing counsel, but losing your composure will undoubtedly hurt your case.

Relevance

We have often heard the objection "it is irrelevant, immaterial and incompetent". This catch-all phrase, which consists of three objections, is not really an acceptable objection. In arbitration it is important to establish the proper foundation. While we are not bound by the same rules of evidence that a court trial would suggest, it is important to use those rules as guidelines. Arbitrators will employ a common-sense approach to evidentiary issues in reaching their decisions.

Manner of speech

It is imperative that the advocate talk *to* the arbitrator, not *at* the arbitrator. Under no circumstance exhibit hostility toward the arbitrator. The arbitrator does not have a personal interest in the case and will do everything to treat both advocates equally and fairly.

Consistency

It is a generally accepted principle that what you say you will prove in the opening statement, you should prove via the testimony. If you were not able to prove it

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during the testimony, do not state that you did in your closing statement or summary brief.

The strength of the argument lies in the ability to state what you are going to prove in the opening statement, prove it via testimony, and restate what you proved in the closing or summary brief.

Documents

Be sure to make sufficient copies of documents: at least one for the arbitrator, your adversary, the witness and yourself. These should be prepared in advance and offered prior to the onset of the hearing, or offered one at a time as the testimony warrants. The documents will be marked and numbered for identification by the arbitrator.

Witnesses

Personal Appearance

It is important for the grievant and the witness to dress conservatively, clean and neatly in accordance with local custom. One does not have to dress to the nines, but whatever is worn should be consistent with local customs and in line with the order of the day.

Credibility

Witnesses should testify to firsthand knowledge: direct observation of that which they are testifying to, rather than hearsay based on third-party information. The witness must be able to establish a basis for what they remember. The witness must be truthful and consistent in testimony. Don't memorize the testimony, as rehearsed testimony often sounds false!

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Preparedness

There is a distinction between a weak witness and weak testimony. Honesty is the best policy. A lie will generally be found out and severely damage the case. Testimony that was clearly memorized casts suspicion and doubt. The veracity of the witness could become questionable.

Testimony

A good witness does not offer opinions, but establishes the facts regarding a specific issue or argument. Testimony is not a time for creative fiction. It is important that the witness say "I don't know" if that be the case. Avoid the use of hedge words and phrases as it will only weaken the veracity of the witness and the validity of what is being stated.

Self-control

It is imperative that witnesses maintain the proper demeanor while testifying. There is no place at the hearing for a person that exhibits a chip on the shoulder. A calm and determinative demeanor will be more conducive to establishing the position being brought forth than an attitude that is belligerent, vacillating, flippant and/or antagonistic to the arbitrator or the opposition. A witness or an advocate that sees the other side as the enemy may cause an arbitrator to discount some of the testimony.

The Arbitrator

How decisions are made

The Collective Bargaining Agreement

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Arbitrators are limited in what they may rule on. For the most part, the collective bargaining agreement sets the limits and generally is confined to the four corners of the contract. Some portions of the agreement may be excluded by consensus as outside of the scope of the arbitrator's jurisdiction. Arbitrators do not grant punitive damages unless there is specific language allowing the arbitrator to do so; very few contracts grant that permission. Basically, punitive damages are left for the courts to decide if the case so warrants.

Past Practice

The issue of past practice is difficult to define in brief and simple terms. It usually relates to an issue that was developed between employees and the employer over a period of time. To be valid, the practice must have been one of a long-standing nature. Its practice must be clear and applied in the same fashion every time the same situation arises. It must have been recognized by both parties and accepted as a practice without reservation. If contract language is unclear, ambiguous or broadly written, the arbitrator may look to past practice as a means of resolving the issue in dispute. While past practices may be binding on issues of employee benefits, they are rarely binding when the issue is one of management rights. If the issue was addressed at the bargaining table but not recreated in writing, it is no longer considered to have the force and effect of past practice. The basic test for past practice is: frequency, consistency, longevity and circumstances. If the issue comes down to contract language versus past practice, clear and precise contract language wins out.

Precedence

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Other arbitration decisions may have an influence on the deliberations of the instant grievance. However the ruling of one arbitrator is not binding on the decision made by another arbitrator. Sure winners can be losers and quite the reverse as well.

Equity

A basic tenet to be considered is that of fairness. Employees need to be treated on an equal basis. Unequal treatment is often sufficient to establish the award in favor of the employee.

Basic Labor Conventions

There are a number of basic labor conventions that are used by arbitrators to aid them in making their decision. This is not meant to be an exclusive list, but simply offer examples of the kinds of information arbitrators view as important in the decision-making process.

Just Cause

A basic tenet in disciplinary proceedings is that management must have "just cause" for imposing discipline. That standard is often written into collective bargaining agreements; even in the absence of precise language, this is a guiding principle used by arbitrators in making their determinations. The question arbitrators will ask themselves is: Did the employer act fairly in imposing the discipline? The answer is found in what is known as the seven tests of just cause:

Was there adequate notice, did the employees know of the rule, and was it adequately disseminated?

Was it a reasonable rule?

Was there significant investigation leading up to the finalization of the charges?

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Was that investigation fair and conducted with objectivity?

Did the evidence produce sufficient proof that the charges were valid?

Was the discipline even-handed and consistent with the way others charged with similar violations were dealt with?

Did the crime justify the penalty?

An answer of "no" to any one of the above questions is often sufficient to establish that just cause was not afforded.

Weingarten Rights

When a meeting is called that could adversely affect their terms and conditions of employment, employees have the right to request representation at that meeting. These rights are guaranteed by the United State Supreme Court, but the employee must request representation. If the employee is refused the requested representation, the employee can refuse to answer further questions without fear of repercussion. Denial of these rights may be legitimate grounds for reversal of certain disciplinary actions.

Progressive discipline

Progressive discipline is a procedure that requires employers to discipline employees in a fair and equitable manner. It helps to maintain the principle that the punishment should fit the crime. The steps in progressive discipline vary from agreement to agreement, but generally initializes with a verbal reprimand, followed by a written warning, a period of suspension and finally, if the behavior has not improved, termination. Many variations exist but the essence is to improve employee behavior and give the employee an opportunity to correct the way in which they behave. The procedure may be truncated for particularly

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serious offenses, with termination being immediate. However, this is an area where the arbitrator needs to review the record to determine the severity, the level to which the offense rose, and if the punishment was appropriate.

Other Issues

Other basic principles and regulations such as those established by the Fair Labor Standards Act are also useful in making the final determination. Many factors, some complex and detailed, go into the issuance of an award whether it be in the favor of the employee or the employer. As was stated earlier, this paper merely scratches the surface of the various factors that are part of the deliberations the arbitrator applies in making the final decision.